No. 04-108

Supreme Court, U.S.
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In The Supreme Court of the United States

SUSETTE KELO, ET AL.,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Connecticut

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888

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LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenue and improve the local economy?

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens—in particular, those dealing with issues affecting the right to own property and to use one's property without unreasonable government interference.

The Rutherford Institute is participating as *amicus* herein because it regards the case as an extraordinary opportunity for the Court to confirm and uphold the

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[1] *Amicus Curiae* The Rutherford Institute files this brief by consent of counsel for all parties. Copies of the letters of consent are on file with the Clerk of the Court. The Rutherford Institute expresses its gratitude for the research assistance provided by J. Charlton Wimberly. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

sacrosanct right to own and use private property without fear of the government usurping that right.

SUMMARY OF ARGUMENT

In the instant case, this Court has the unique opportunity to affirm once and for all that there is private property beyond the reach of government. Moreover, the Court can put a stop to city officials who use the sledgehammer of eminent domain as an economic tool, rather than for traditional public uses.

Indeed, in this case, the Court is presented "with a clash of two bedrock principles of our legal tradition" – the sovereign's power of eminent domain and "the sacrosanct right of individuals to dominion over their private property." *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769 (Mich. 2004) ("Hathcock").

Each of these principles has a place in our nation's history. The power of eminent domain is an attribute of sovereignty[2] implicitly recognized by the Fifth Amendment. *Kohl v. United States*, 91 U.S. 367, 372 (1875).[3] And securing the property rights of citizens is a "principal function of government." So important is this function that, during

[2] *See, e.g.*, Alfred D. Jahr, Eminent Domain: Valuation and Procedure 3 (1953).

[3] *See also* Steven J. Eagle, *Protecting Property from Unjust Deprivations Beyond Takings: Substantive Due Process, Equal Protection, and State Legislation, in* TAKING SIDES ON TAKINGS ISSUES 510 (2002) (noting that the Fifth Amendment's Takings Clause "implicitly acknowledges that the power of eminent domain devolved from the British Crown to the federal government as well as the states").

colonial times, it was believed that "any government that rendered property rights insecure violated the very purpose of its existence. Such a government would forfeit the allegiance of its citizens and would be open to rebellion."[4]

Courts must balance these two "bedrock principles" in such a way that governments can acquire property only when that property is necessary for a public use and citizens can remain secure in their private property rights. *Hathcock*, 684 N.W.2d at 769. When deciding what constitutes a "public use"[5] and, therefore, when "[t]he despotic power . . . of taking private property" may be exercised, it is vitally important to consider our nation's legacy of protecting private property rights and whether permitting the exercise of eminent domain in the case at hand would violate that legacy. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (Dall.) 304, 311 (C.C.D. Pa. 1795).

To allow the use of eminent domain as it was used by Respondents in the instant case is to cease balancing and to make the power of eminent domain absolute and tyrannical. Because it will always be possible to put land to more productive use, allowing the exercise of eminent domain in such cases will mean that no land will ever be safe from government confiscation, thus ending the sanctity of private property as we have known it.

[4] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 28 (1998).

[5] *See* U.S. Constitution, Amendment V (providing that private property shall not "be taken for public use, without just compensation").

ARGUMENT

I. THE SANCTITY OF PRIVATE PROPERTY IS A FUNDAMENTAL PRINCIPLE OF AMERICAN LAW.

The importance of protecting "the sacrosanct right of individuals to dominion over their private property" pervades our nation's history. *Hathcock*, 684 N.W.2d at 769. This principle was recognized prior to the adoption of our Constitution on both sides of the Atlantic. It also was venerated by the Framers and has been applied in the courts.

The Magna Carta provided that "[n]o freeman shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers or by the law of the land."[6] John Locke wrote that "'[t]he great and *chief end* . . . of Men uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.'"[7] And William Blackstone recognized "the right of private property"[8] as one of the three "absolute" rights "which every man is entitled to enjoy."[9] As did Locke, Blackstone asserted that "the first and primary end of human law is to maintain and regulate these *absolute* rights of individuals."[10]

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[6] Bernard H. Siegan, Property Rights: From the Magna Carta to the Fourteenth Amendment 7 (2001) (translating from the Latin Chapter 39 of King John's charter).

[7] John Locke, *Second Treatise* § 124, *in* Two Treatises of Government (1960) (quoted in Siegan, *supra* note 6, at 47).

[8] 1 William Blackstone, Commentaries *129.

[9] *Id.* at *124. The other two absolute rights were "the right of personal security" and "the right of personal liberty." *Id.* at *129.

[10] *Id.* at *124.

The early state constitutions similarly identified the protection of property rights as among the chief purposes of government. The New Hampshire Constitution of 1784 listed "acquiring, possessing and protecting property" as "natural, essential, and inherent rights" possessed by all men.[11] The Pennsylvania Constitution of 1776 also regarded the protection of private property as "among the natural and inherent rights of all persons."[12] Indeed, "[f]ollowing the Revolution and prior to the drafting of the federal Constitution, every state constitution was based on the idea that the purpose of government was to preserve natural rights to 'life, liberty and property.'"[13]

These principles were reiterated by many of the Framers, whose "great focus" was "the security of basic rights"—"property in particular."[14] For instance, James Madison wrote in *The Federalist No. 10* that "the first object of government" is "the protection of [men's] different and unequal faculties of acquiring property."[15] Madison later wrote, in the *National Gazette*, that "[g]overnment is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[16] Alexander Hamilton proclaimed that "[o]ne great

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[11] Ely, *supra* note 4, at 30.

[12] *Id.* at 31-32.

[13] Polly J. Price, Property Rights: Rights and Liberties Under the Law 3 (2003). *Cf.* Ely, *supra* note 4, at 32 ("[T]he constitutional protection of property rights was established in the states well before the adoption of the federal Constitution.").

[14] Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 92 (1990).

[15] The Federalist No. 10, at 55 (James Madison) (2000).

[16] James Madison, *Property*, Nat'l Gazette, Mar. 29, 1792, at 174.

objt. of Govt. is personal protection and the security of Property."[17] And John Adams wrote that "[p]roperty must be secured, or liberty cannot exist."[18] In short, "colonial leaders viewed the security of property as the principal function of government."[19]

This principle of protecting private property—championed by our nation's founders and their predecessors—also has been enforced in the courts. In 1795, in *Vanhorne's Lessee*, a federal circuit court stated:

> [T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact[.]

Id., 2 U.S. (Dall.) at 310. Three years later in *Calder v. Bull*, 3 U.S. 386 (1798), Supreme Court Justice Samuel Chase, writing for this Court, recognized that governments possess the power of eminent domain, noting that private property may be taken "for PUBLIC use." *Id.* at 394. However, Justice Chase also asserted that "[i]t is against all reason and justice, for a people to entrust a Legislature" with the power to

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[17] Ely, *supra* note 4, at 43 (quoting 1 The Records of the Federal Convention of 1787 534 (1937)).

[18] Jean Edward Smith, John Marshall: Definer of a Nation 388 (1996) (quoting 6 The Works of John Adams 280 (1850)).

[19] Ely, *supra* note 4, at 28.

"take[] property from A. and give[] it to B." *Id.* at 388. "The Legislature may enjoin, permit, forbid, and punish . . . *but they cannot . . . violate . . . the right of private property.*" *Id.* (emphasis added). To suggest otherwise "would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." *Id.* at 388-89.

II. PRIVATE PROPERTY RIGHTS MUST BE BALANCED AGAINST THE POWER OF EMINENT DOMAIN.

Because the two "bedrock principles" of eminent domain and securing private property must coexist, neither can be absolute. *Hathcock*, 684 N.W.2d at 769. Rather, courts must engage in a balancing act: protection of private property must yield in some circumstances when property is needed by the government to fulfill its duties; and the power of eminent domain must be limited only to instances where it is *necessary*, so that the security of private property can endure.

The circuit court in *Vanhorne's Lessee* underscored the role that necessity must play in the exercise of eminent domain. The court noted that "[t]he despotic power, . . ., of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it." *Id.*, 2 U.S. (Dall.) at 311. However, the court also noted that "[t]he presumption is, that they will not call it into exercise *except in urgent cases, or cases of the first necessity.*" *Id.* (emphasis added). Concerning the use of eminent domain to take land from one private party and give it to another, the court went on to say that it would be

> difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. . . . Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?

Id. at 311-12.

The necessity of balancing these fundamental principles is not a thing of the past. Only last year, in a case with facts similar to those in the instant case, the South Carolina Supreme Court emphasized the necessity of limiting the power of eminent domain in order to preserve property rights. *See Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003). In that case, a county attempted to use eminent domain to acquire private lands, which were to be leased to a private corporation. *Id.* at 854. The county asserted that the subsequent development by the private corporation would result in economic benefits to the public. *Id.* at 856.

The court, however, refused to allow the exercise of eminent domain for such a purpose because doing so would have been "in derogation of the right to acquire, possess, and defend property." *Id.* at 856. Despite the fact that the project's projected economic benefit to the county was "very attractive," it could not justify the use of eminent domain: "'However attractive the proposed [project], however desirable the project from a [government] planning point of

view, the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases.'" *Id.* at 856 (alterations in original) (quoting *Karesh v. City Council*, 247 S.E.2d 342, 345 (S.C. 1978)).

A. THE CONNECTICUT COURT'S DECISION ALLOWS LIMITLESS GOVERNMENTAL INTRUSION UPON THE RIGHT OF PERSONS TO RETAIN PRIVATE PROPERTY.

If the power of eminent domain can be exercised as Respondents have in the instant case—taking land from A and giving it to B on the theory that B will use it more productively and therefore provide greater benefits to society—then there remains "absolutely no limit on the right to take private property," and, therefore, a citizen's private property will "never be safe from invasion." *Owensboro v. McCormick*, 581 S.W.2d 3, 6 (Ky. 1979) ("McCormick") (quoting *Chesapeake Stone Co. v. Moreland*, 104 S.W. 762, 765 (Ky. 1907)) ("Moreland"). Numerous courts have recognized this inevitable result.

The Michigan Supreme Court recently attested to this fact in *Hathcock*. In that case, the county sought to acquire land for a development project that would create new jobs and greater tax revenue. *Id.* at 770. This projected contribution to society of more jobs and greater revenue was the "public use" the county hoped would justify its exercise of eminent domain. The court, however, pointed out that "every productive unit in society . . . contributes in some way to the commonwealth." *Id.* at 786. The court warned that "if one's ownership of private property is forever

subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." *Id.*

In a similar case, the Illinois Supreme Court noted that "'[i]f private property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain.'" *S.W. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002) (quoting 710 N.E.2d 896, 906 (Ill. App. Ct. 1999) (Kuehn, J., concurring)).

In yet another similar case, the Kentucky Supreme Court summarized the problem in this way:

> If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, *there would be absolutely no limit on the right to take private property.* It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and *under this rule the property of the citizen would never be safe from invasion.*

McCormick, 581 S.W.2d at 6 (emphasis added) (quoting *Moreland*, 104 S.W. at 765).

And in *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967), the Arkansas Supreme Court also recognized this principle. The court considered whether a city could use its power of eminent domain "to take private property for use as an industrial park." *Id.* at 488. The court ruled that allowing such use of the power of eminent domain would mean that "the city could condemn the plant of an existing industry to secure another." *Id.* at 492. The court went on to hold, "[w]e do not believe that it was intended that [the constitutional amendment at issue] be the vehicle for overruling all principles of existing law of eminent domain, in view of our recognition that the right of private property is higher than constitutional sanction." *Id.*

B. Special Consideration Must Be Given When the Taking of People's Homes Is Involved.

Finally, when balancing the sacrosanct right to private property with the power of eminent domain, special consideration must be given to cases where the land sought to be taken includes people's homes. In *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970), this Court stated, "[T]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." While this statement was made in a context very different from eminent domain, it nevertheless demonstrates that the law treats individuals' homes as more important than their other property. *Cf. Payton v. New York*, 445 U.S. 573, 585 (1980) (invasion of the home is the chief evil against which

the prohibition on unreasonable searches and seizures was directed). There is no reason that this principle should not be extended to the present context.

CONCLUSION

The principle of protecting private property rights is indisputably a fundamental aspect of our nation's history and jurisprudence. If this principle is to continue, then the use of eminent domain in cases like the one at hand must be found unconstitutional. Otherwise, the right to private property will be swallowed up by an eminent domain power that can be exercised whenever a state or local government determines that someone's property could be put to more productive use. As explained by the Kentucky Supreme Court almost a century ago, "under this rule the property of the citizen would never be safe from invasion." *Moreland*, 104 S.W. at 762, 765.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

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